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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 726

ROBERT T. MATHIS, SR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PETITIONER

NICHOLAS J. CAPUANO of
LURIE & CAPUANO
Attorneys for Petitioner
1409 Biscayne Building
Miami, Florida 33130

INDEX

SUBJECT INDEX

	Page
Statement of the Case	1
(a) Reference to official report of decision of the United States Court of Appeals, Fifth Circuit, upon which this petition is based	1, 7-8
(b) Statement of grounds upon which the jurisdiction of the Supreme Court of the United States is invoked with reference to statutory provisions and the time factors upon which the jurisdiction rests	1-2
(c) Constitutional provisions and statutes involved	2-3
(d) (1) Questions presented for review	3
(e) A concise statement of the case, containing all that is material to the consideration of the questions presented, with appropriate references to the printed record	3-8
(f) & (g) Argument as to Question I	8-10
Argument as to Question II	10-11
(h) Conclusion	11
(i) Certificate of service	12

TABLE OF AUTHORITIES

Miranda v. *State of Arizona*, 86 S.C. 1602 (1966) 5, 9-10

STATUTES

Constitutional provisions, Sixth Amendment, United States Constitution	2, 8
U.S.C.A., Title 18, §287	2, 3
U.S.C.A., Title 18, Rule 41(e)	3

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(a) The opinion of the United States Court of Appeals, Fifth Circuit, sought to be reviewed herein, dated April 28, 1967, is officially reported at 376 Fed. 2d 595 and is shown in the printed Appendix beginning on Page A-6.

(b) Jurisdiction of this Court is invoked pursuant to the provisions of Rule 37(b)(1)(2) of the Federal Rules of Criminal Procedure. As set forth in the petition for writ of certiorari, the United States Court of Appeals, Fifth Circuit, entered the opinion as above stated on the 28th

day of April, 1967. A petition for rehearing was filed on May 9, 1967, which was denied by the United States Court of Appeals, Fifth Circuit, on May 25, 1967 (A-9). The issuance of the mandate was stayed by the United States Court of Appeals, Fifth Circuit, on June 1, 1967, for a period of thirty days from May 25, 1967. A timely petition for a writ of certiorari to the United States Court of Appeals, Fifth Circuit, was filed by the Petitioner, ROBERT T. MATTHIS, SR., on June 26, 1967, and certiorari was granted by this Court on October 16, 1967.

(c) **Constitutional Provisions and Statutes Involved**

(1) United States Constitution, Sixth Amendment:

> "In all criminal prosecution, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district, wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

(2) U.S.C.A., Title 18, §287, Page 26:

> "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both."

(3) U.S.C.A., Title 18, Rule 41(e), Federal Rules of Criminal Procedure, Page 213:

> " * * * The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

(d) (1) **Questions Presented**

I

Did the lower Court err in admitting into evidence testimony and documents obtained in violation of Petitioner's constitutional rights?

II

Did the lower Court abuse its discretion in not entertaining Petitioner's motion to suppress such evidence at the time of trial, where the Petitioner was not aware of the grounds for the motion to suppress until the time of trial?

(e) **A Concise Statement of the Case**

Your Petitioner, ROBERT T. MATHIS, SR., was charged in a two-count indictment rendered by the Grand Jury at Miami, Florida, in the United States District Court for the Southern District of Florida charging the Petitioner with knowingly and wilfully filing with the District Director of Internal Revenue at Jacksonville, Florida, a false claim for an income tax refund for the year 1960, in Count One, and for an income tax refund for the year 1961, in Count Two, in violation of Title 18, U.S.C., Section 287 (A-2).

He was convicted on both counts (A-3) and sentenced for a period of 30 months on each count to run concurrently (A-4).

The Government contended that the Petitioner, ROBERT T. MATHIS, SR., received and cashed a refund check for the year 1960 in the sum of $885.60 (Government's Exhibit 3, R-54, A-42, 107) and that, although he filed a false claim for an income tax refund in 1961 in the sum of $931.20, and a refund check was issued and cashed, it is interesting to note that only the 1960 refund check was offered in evidence (Government's Exhibit 3, R-52, 54, A-40, 42, 107).

The Government, over Petitioner's objections, was permitted to introduce through Walter McDaniel (R-8, A-17), Personal Representative of the District Director of Internal Revenue for the Jacksonville District, the following documents:

1960 tax return (Government's Exhibit 1A, R-10, 12, 15, A-18, 19, 20, 105)

Consent form 872 regarding the 1960 return (Government's Exhibit 1B, R-10, 12, 14, 15, 17, A-18, 19, 20, 21, 108)

1961 tax return (Government's Exhibit 2A, R-12, 14, A-26, 28, 186)

Consent form 872 regarding the 1960 return (Government's Exhibit 1C, R-12, 14, 15, 17, A-19, 20, 21, 109)

Form 872 further extension on the 1960 return (Government's Exhibit 1D, R-14, 15, 17, A-20, 21, 110)

Form 872 extension regarding the 1961 return (Government's Exhibit 2B, R-12, 19, 20, A-19, 22, 23, 111)

Letter mailed to the Petitioner 11/30/64 concerning form 872 on the 1960 return (Government's Exhibit 2C, R-12, 19, 20, A-19, 22, 23, 112)

Petitioner's counsel moved the Court to be allowed to argue the motion to suppress such documents outside the presence of the jury, which motion was denied (R-10, 15, 16, A-17, 20, 21), upon the ground that such records were official and could not be suppressed under any circumstances (R-17, A-21). The Court then announced that it would hear Petitioner's motion to suppress such evidence later on (R-17, 18, A-22); but never did.

The Government, through Internal Revenue Agent Lawless (R-26, A-26), and over Petitioner's objections, was permitted to identify and testify regarding the 1960 tax return (Government's Exhibit 1A, R-14, 27, 28, A-19, 27, 105); 1961 tax return (Government's Exhibit 2A, R-14, 27, 28, 33, A-19, 27, 30, 106); form 872 which extended the period of the Statute of Limitations on the 1960 return (Government's Exhibit 1C, R-17, 29, 30, A-21, 28, 109); form 872, extending the period of the Statute of Limitations on the 1961 return (Government's Exhibit 2B, R-20, 32, A-23, 30); and form 872, further extending the period of the Statute of Limitations on the 1960 return (Government's Exhibit 1D, R-17, 33, A-21, 30, 110).

Again, motions to suppress were made to exclude the documents and any testimony regarding such documents, on the authority of *Miranda* v. *Arizona*, 86 S.C. 1602 (1966) (R-29, A-28).

In denying the motion, the Trial Judge stated (R-29, A-28):

The Court: I will overrule that. You don't have to advise everybody of his rights every time you ask him questions.

I think we are coming to that pretty quickly if the Supreme Court keeps on.

Mr. Lurie: We have come to it in the case of Miranda vs. Arizona.

The Court: Oh, no. Miranda says, If you arrest a man, you have a collar on him, you can't ask him any questions. That is all it says.

Internal Revenue Agent Lawless testified that on October 30, 1964, he interviewed the Defendant, who was at that time incarcerated in the Florida State Penitentiary (R-35, A-31), for the purpose of determining if the 1960 return (Government's Exhibit 1A, R-13, 14, A-19, 105) was prepared by the Defendant and to obtain Defendant's consent in writing to extend the Statute of Limitations on the 1960 return dated March 31, 1961. That at such interview, the Defendant identified the 1960 tax return and the signature thereon as his (R-27, 28, A-27) and also signed form 872 extending the limitation period on the 1960 return (Government's Exhibit 1C, R-17, A-21), thereby giving the Government additional time to investigate the return and determine the proper tax liability; although no criminal investigation was being conducted at that time (R-29, 30, A-28).

Agent Lawless further testified that on March 2, 1965, he again interviewed the Defendant at the Florida State Prison (R-31, A-29), at which time the Defendant identified the 1961 tax return (Government's Exhibit 2A, R-14, A-19, 106) and the signature thereon as his (R-34, A-30) and executed another 872 form (Government's Exhibit 1D,

R-15, 17, 33, A-20, 21, 30) again extending the Statute of Limitations on the 1960 return (Government's Exhibit 1A, R-14, 27, 28, A-19, 27, 105) and signed consent form 872 extending the limitation period on his 1961 tax return (Government's Exhibit 2B, R-20, 32, A-23, 30).

Agent Lawless candidly admitted on cross-examination that, when he interviewed the Defendant on October 30, 1964, and again on March 2, 1965, there was a possibility of a criminal violation although he did not advise the Defendant that he did not have to answer any questions or sign any documents that may tend to incriminate him or, if the Defendant did sign any documents or answer any questions, they may be used against him at some other time (R-35, A-31), that he did not advise the Defendant he was entitled to have a lawyer before being questioned (R-36, 41, 42, A-32, 34, 35).

However, eight (8) days later, on March 10, 1965, agent Lawless referred Defendant's case to the Internal Revenue Intelligence Division as involving indications of fraud (R-46, 47, A-37). On June 9, 1965, agent Lawless, and agent Schilling, of the Intelligence Division, sought to again interview the Defendant but, when the Defendant was advised of his constitutional rights (for the first and only time), the Defendant stated he preferred not to talk and the agents left (R-48, A-38).

The opinion of the United States Court of Appeals, Fifth Circuit (A-6) recites, among other things:

> "* * * The evidence clearly reflects that until March 10, 1965, when appellant's case was initially referred to agents of the Intelligence Division, the inquiry involving appellant's tax returns represented no more

than a routine civil tax investigation. Indeed, it was not until November 23, 1965, over eight months later, that an indictment was returned charging appellant with the filing of a fraudulent claim. No arrest warrant was executed until April 21, 1966. At both of the interviews in question, appellant was fully informed of the Government's concern with the accuracy of his tax returns and he voluntarily cooperated with the investigating agent, there being no misrepresentation, fraud, deceit, or misconduct employed to gain such cooperation."

A careful study of this opinion will reflect without dispute that the United States Court of Appeals, Fifth Circuit, failed to give any consideration to the Defendant's privilege against self-incrimination under the Fifth Amendment and the Defendant's right to counsel under the Sixth Amendment.

(f) * * *

(g) **The Argument as to Question I**

Agent Lawless interviewed the Defendant for the first time on October 30, 1964, at the Florida State Penitentiary to obtain the consent for extending the time for assessment of the 1960 return dated March 31, 1961 (Government's Exhibit 1A, R-14, A-19, 105). The purpose of obtaining the consent was not to extend the Stafute of Limitations as advanced by Agent Lawless, but a trick and device in and by which he would obtain a sample of the Defendant's handwriting for criminal prosecution. The purpose of the third visit to the Defendant on June 9, 1965, by Agents Lawless and Schilling was to have a witness to the Defendant's signature.

It is obvious that the Government, in order to prove their case, needed the Defendant's handwriting sample to compare it with the endorsement on the 1960 refund check (Government's Exhibit 3, R-54, A-41, 107) and the 1960 and 1961 returns (Government's Exhibits 1A, 2A, R-14, A-19, 103, 106), which now takes us to Assignment of Error 1 as to whether the Court erred in admitting into evidence the testimony of agent Lawless and the documents obtained by him from the Defendant while incarcerated in Raiford State Prison.

Miranda v. Arizona, 86 S.C. 1602 (1966), states as follows:

> "(3-9) Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. *By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.* As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive

effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned." (Emphasis added.)

The Argument as to Question II

The Court deprived the Petitioner of a fair and impartial trial guaranteed to him under the Sixth Amendment of the Constitution of the United States in refusing throughout the course of the entire trial to hear a motion to suppress the evidence as provided in Rule 41(e) of the Federal Rules of Criminal Procedure.

In challenging the legality of the evidence and how it was obtained, counsel repeatedly moved to suppress such evidence. The trial judge stated (R-16, A-21):

> The Court: It is too late now. I will hear it during the course of the trial. You can do it later on to suppress it. The evidence will probably come in.

In denying the Petitioner the right to a hearing on a motion to suppress outside the presence of the jury and without ruling on such motion prior to the case being submitted to the jury was highly prejudicial. The jury

was able to hear throughout the testimony of certain Government witnesses that the Petitioner was incarcerated in the Florida State Penitentiary for another offense, and that to deny him a motion to suppress outside their presence and hearing, certainly denied the Petitioner his right to a fair and impartial trial.

It is extremely essential that this Court take notice that Mr. Lurie was appointed by the Court on May 4, 1966, to represent the Petitioner. That it was not until June 6, 1966, that the Court ordered discovery in the case and the trial was held on the 22nd day of June, 1966. That between the time of obtaining the documents from the Government and proceeding to trial, there was insufficient time to prepare a written petition for hearing to suppress such evidence prior to the date of trial. Certainly, under these circumstances, it was an abuse of discretion for the trial Court not to hear the Petitioner's ore tenus motion to suppress the evidence on behalf of such Petitioner.

Conclusion

The Petitioner, ROBERT T. MATHIS, SR., is clearly entitled, as demonstrated under the foregoing specifications of error, to a judgment of acquittal or, in the alternative, to a new trial.

Respectfully submitted.

NICHOLAS J. CAPUANO
Attorney for Petitioner,
Robert T. Mathis, Sr.
1409 Biscayne Building
Miami, Florida 33130

Certificate of Service

The undersigned counsel of record for the Petitioner hereby certifies that a true and correct copy of the Brief of the Petitioner on the Merits was furnished by air mail, by depositing same in a United States mailbox, with first class postage prepaid, addressed to counsel for the Respondent, the Honorable Erwin N. Griswold, Solicitor General, Department of Justice, Washington, D.C. 20530, on this 15th day of January, 1968.

NICHOLAS J. CAPUANO